

Editor's note: 78 LD. 163; Reconsideration denied by order dated Oct. 1, 1971

UNITED STATES
v.
RUSSELL G. WELLS

IBLA 70-47 Decided May 10, 1971

Homesteads (Ordinary): Residence – Homesteads (Ordinary): Cancellation of Entry

Where the house in which the entryman claims he maintained his residence is situated in a noncontiguous subdivision more than one-quarter of a mile from the nearest entered land, it is too far removed from the entry to show compliance with the residence requirements of the homestead law, and the entry is properly canceled.

Equitable Adjudication: Substantial Compliance

Equitable adjudication is not available to a homestead entryman in the absence of substantial compliance with the requirements of the homestead laws.

IBLA 70-47 : Cheyenne 056130

UNITED STATES ;

v.

RUSSELL G. WELLS

: 057297

:

: Stockraising homestead

: entries canceled

:

: Affirmed

DECISION

Russell G. Wells has appealed to the Secretary of the Interior from a decision of April 2, 1969, by the Office of Appeals and Hearings, Bureau of Land Management which affirmed a decision of a hearing examiner, dated January 17, 1969, canceling Wells' stockraising homestead entry Cheyenne 056130 and his additional stockraising homestead entry Cheyenne 057297 on the grounds that the house or cabin was not on the entered lands and was not habitable at the time of final proof.

An application filed by Russell G. Wells for an original stockraising homestead entry embracing 319.52 acres described as the E 1/2 SW 1/4 sec. 10; S 1/2 NE 1/4 sec. 3; NW 1/4 SW 1/4 sec. 2; and NE 1/4 SE 1/4; and lot 1 sec. 1, all in T. 39 N., R. 67 W., 6th P.M., Wyoming, was allowed on April 13, 1934. An application filed by Wells for an additional stockraising homestead entry covering 320 acres described as the SE 1/4 sec. 11 and the SW 1/4 sec. 12, all in T. 39 N., R. 67 W., 6th P.M., Wyoming, was allowed on June 7, 1934. Wells remained on the land until 1936, when he left to work in Nebraska. He rendered active service in the United States Navy from 1936 to 1957. Final proof for his entries was submitted in July 1966.

On March 1, 1968, the Bureau of Land Management filed a contest complaint charging that at the time appellant submitted final proof on the entries (a) the cabin in which contestee claims he maintained his residence was not habitable; and (b) the cabin was not and had never been located on the entry lands. The contestee filed a timely answer denying the allegations of the complaint and requesting that the final proof be accepted and that patents issue. A hearing was held on May 21, 1968, on the two issues set forth in the complaint.

The primary question to be resolved in this appeal is whether the cabin in which the contestee claims he maintained his residence was on the land at the time he submitted final proof. The Government produced one witness at the hearing – a qualified civil engineer and licensed land surveyor. His testimony primarily concerned the location of the cabin in relation to the entered lands. This witness went into great detail concerning the procedures used in his survey. He concluded from his survey that the cabin is situated in the SE 1/4 SW 1/4 sec. 34 in the township north of the township in which the entered lands are located. Therefore, his survey indicated that the cabin was 1650 feet, or more than one quarter mile, northwest of the south half of the NE 1/4 of sec. 3, T. 39 N., R. 67 W, the closest of the several parcels in the subject entries.

The contestee failed to offer credible evidence to rebut the testimony offered by the Government. Rather, the contestee relied upon cross-examination of the Government witness. An attempt was made to discredit the survey and the resulting conclusions by implying that the method of survey used might not have been proper. However, for the reasons hereinafter outlined, there can be no doubt but that the contestee completely failed to discredit the survey and the conclusions reached, either by indirect or direct evidence.

The only evidence in the record which accurately fixes the location of appellant's cabin is the testimony of a qualified, licensed land surveyor. The record clearly shows that the survey was properly conducted. The survey began at a known township boundary marker; during the survey procedure the surveyor found the marker for the common corner of secs. 2 and 3 and secs. 34 and 35. He testified that the topographic calls in the field notes of the original survey substantially agreed with what he had observed during the course of his survey. There was no speculation on the part of the surveyor, for he found on the township boundary line two official survey corner markers which are reliable and acceptable. On the other hand, the appellant failed to offer anything to show that the Government surveyor's method was improper or that an accurate result was not obtained by its use. Mere inferences that there might be error or that the markers may have been moved at some unknown time in the past are purely speculative and conjectural. There can be no doubt that the cabin is not on any of the entered land and is, in fact, more than a quarter of a mile northwest of the nearest entered land.

The decisions below found that the cabin was neither on the entered lands nor on lands contiguous to the entered lands. An entryman is required to have a habitable house on the entered land at the time of submitting final proof. 43 U.S.C. §§ 164, 292, 293 (1964); 43 CFR 2511.4-1, formerly 43 CFR 2211.2-1. The failure to construct a house on the entered lands is a fatal defect; the entries must be canceled for failure to comply with the terms of the homestead laws. The United States Supreme Court in Great Northern Ry. v. Hower, 236 U.S. 702 (1915), noted that even conceding good faith on the part of the entryman whose house was situated one quarter of a mile from the nearest entered land, the entryman's settlement was on a tract of land which was noncontiguous to the tract he undertook to enter, being separated from it by a 40-acre tract. The court held that the house was too far removed from the claimed land to entitle the entryman to the relief sought. The facts and holding of Great Northern, supra, are controlling in the instant case.

In his brief to the Secretary, appellant attempts to distinguish Great Northern from the instant case on the basis that the former involved a contest between private parties and the present case involves a contest between an entryman and the Government. This is not sufficient reason to conclude that the ruling in Great Northern is inapplicable here. In Great Northern, the court was concerned with the application of the homestead laws where the house was one quarter of a mile from the nearest entry lands. Here we are concerned with the same laws as they apply to a cabin situated more than one quarter mile from the nearest entered lands. Cases cited by appellant are the same cases considered by the Supreme Court in Great Northern. The court refused to apply the cases there; the almost identical fact situation prohibits us from applying them in this instance. We conclude that the cabin is too far removed from the entered land to satisfy the statute.

Having determined that the cabin was not located on the entered land and that such is a fatal defect, we need not discuss any other issues presented in this appeal, except appellant's request for equitable adjudication.

Throughout his various appeals, appellant has repeatedly asserted that he is entitled to equitable adjudication. The general statute concerning equitable adjudication is the act of September 20, 1922, 43 U.S.C. § 1161 (1964). Under the regulations adopted pursuant to the statute, 43 CFR 1871.1-1,

formerly 43 CFR 2011.1-1, equitable adjudication of entries is permitted where there has been substantial compliance with the law. From the evidence, we find no basis for concluding that there has been substantial compliance with the requirements of the homestead law, an indispensable prerequisite to invocation of equitable adjudication. United States v. Lloyd W. Booth, 76 I.D. 73 (1969).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Francis E. Mayhue, Member

We concur.

Frederick Fishman, Member (concurring specially)

Martin Ritvo, Member

Frederick Fishman, concurring specially.

I agree with the result reached in this case, although I differ with a broad principle enunciated in the decision.

What concerns me is the flat statement in the decision to the effect that "[t]he failure to construct a house on the entered lands is a defect; the entries must be canceled to comply with the terms of the homestead laws," citing Great Northern Ry. v. Hower, 236 U.S. 702 (1915).

A casual reading of Great Northern would impel such a result. However, it must be recognized that Great Northern involves an adverse claimant to the land, the railroad claiming through its grantor, another railroad, under the act of August 5, 1892, Ch. 382, 27 Stat. 390. The authority of the Secretary of the Interior to grant equitable adjudication is limited to situations where it can be granted ". . . without prejudice to the rights of conflicting claimants." 43 U.S.C. § 1162 (1964). The same limitation is embodied in the present regulation, 43 CFR 1871.1-1, formerly 43 CFR 2011.1-1, which only permits equitable adjudication where there is "no lawful adverse claim."

My point is that Great Northern implicitly turns on the issue of an adverse claim by the railroad. Moreover, the existence of such a claim made equitable adjudication by the Department improper, as was the cancellation of the railway's selection because of the exercise of equitable adjudication. In that context, the discussion in the decision as to the need for a habitable house on the entry would seem academic. I fully recognize, however, that the ratio decidendi of Great Northern rested upon that issue.

I reiterate that I have no quarrel with the result reached in the case at bar. The purported "habitable house" was situated not only a 1/4 mile from the entry, but also on land patented in 1937. The intervening subdivisions were also privately owned, having been patented in 1921. Moreover, the record amply supports the view that the appellant was casual in seeking to establish the boundaries of his homestead.

The purpose of this concurring opinion is to make crystal clear that I do not subscribe to the doctrine that a habitable house must be on the lands in the entry, failing in which the entry must be canceled. I object to the broad sweep of that doctrine. In appropriate cases where care and good

faith have been manifested, in seeking to determine the boundaries of the entry, or where other extenuating circumstances are present, and the habitable house is reasonably close to the entry on an adjoining or cornering subdivision, equitable adjudication may be appropriate. Cf. Everett J. Wilde, Fairbanks 012045, approved February 1, 1961, by Assistant Secretary John A. Carver, Jr. and Signar John Jacobson, A-21064 (January 10, 1938).

